IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

CATERPILLAR INC. — PETITIONER

v.

JAMES DAVID LEWIS — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether in a removed action the principles of judicial economy preclude vacating a judgment due to an alleged lack of diversity of citizenship at the time of the removal when the nondiverse party was dismissed from the action prior to trial and said party's rights were derivative of the plaintiff?

2. Whether in a removed action the failure to file an interlocutory appeal from the denial of a motion to remand constitutes a waiver of the jurisdictional challenge where the alleged jurisdictional defect existing at the time of removal was subsequently cured prior to trial?

3. Whether in a removed action the citizenship of a tortfeasor against whom a worker's compensation carrier asserted a claim derivative of the plaintiff's personal injury claim should be considered for purposes of determining diversity of citizenship where the plaintiff settled the personal injury claim against the tortfeasor prior to removal?

LIST OF PARTIES

The Petitioner is Caterpillar Inc., a corporation which has no parent companies. Its nonwholly owned subsidiaries include Cyclean, Inc.; Advanced Filtration Systems, Inc.; Health Plan of Central Illinois, Inc.; Caterpillar Commercial N.V.; AO Nevarnash; and UNOC Equipment and Supply, LLC. The Respondent is James David Lewis. The parties to the proceedings before the Sixth Circuit Court of Appeals were limited to Caterpillar Inc. and James David Lewis. The proceedings before the United States District Court for the Eastern District of Kentucky, Ashland Division, also included Liberty Mutual Insurance Group; Gene A. Wilson Enterprises, Inc.; and Whayne Supply Company.

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Petitioner, Caterpillar Inc., petitions as follows for a Writ of Certiorari to review the October 11, 1995 Opinion of the United States Court of Appeals for the Sixth Circuit which vacated the Judgment entered by the United States District Court for the Eastern District of Kentucky, Ashland Division, on November 23, 1993.

OPINIONS BELOW

The Judgment of the United States District Court for the Eastern District of Kentucky, Ashland Division, entered on November 23, 1993, and the Opinion of the United States Court of Appeals for the Sixth Circuit entered on October 11, 1995 are not published.

JURISDICTION

This Petition seeks review of an Opinion entered by the United States Court of Appeals for the Sixth Circuit on October 11, 1995. A Petition for a Rehearing filed by Petitioner, Caterpillar Inc., was denied by the United States Court of Appeals for the Sixth Circuit on November 21, 1995.

Caterpillar Inc. seeks to invoke the jurisdiction of this Court to review the Opinion of the United States Court of Appeals for the Sixth Circuit under 28 U.S.C. §1254(1) (1993) which provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the

following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

STATUTES

One federal statute involved in this review is 28 U.S.C. §1332(a)(1) (1993) which provides:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

A second federal statute involved in this review is 28 U.S.C. §1446(b) (1995) which provides:

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

A third federal statute included in this review is 28 U.S.C. §1292(b) (1995) which provides:

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the

Court of Appeals or a judge thereof shall so order.

The state statute involved in this review is Ky. Rev. Stat. §342.700(1) (1995) which provides:

> (1) Whenever an injury for which compensation is payable under this chapter has been sustained under circumstances creating in some other person than the employer a legal liability to pay damages, the injured employee may either claim compensation or proceed at law by civil action against the other person to recover damages, or proceed both against the employer for compensation and the other person to recover damages, but he shall not collect from both. If the injured employee elects to proceed at law by civil action against the other person to recover damages, he shall give due and timely notice to the employer and the special fund of the filing of the action. If compensation is awarded under this chapter, the employer, his insurance carrier, the special fund, and the uninsured employer's fund, or any of them, having paid the compensation or having become liable therefor, may recover in his or its own name or that of the injured employee from the other person in whom legal liability for damages exists, not to exceed the indemnity paid and payable to the injured employee, less the employee's legal fees and expense. The notice of civil action

shall conform in all respects to the requirements of KRS 411.188(2).

STATEMENT OF THE CASE

This Petition for Writ of Certiorari ("Petition") arises out of a personal injury action brought on June 22, 1989, in Lawrence Circuit Court, Lawrence County, Kentucky, by James David Lewis ("Lewis") [with Kentucky citizenship] against Caterpillar Inc. ("Caterpillar") [with Delaware and Illinois citizenship] and Whayne Supply Company ("Whayne Supply") [with Kentucky citizenship]. Liberty Mutual Insurance Group ("Liberty Mutual") [with Massachusetts citizenship] filed an intervening complaint seeking pursuant to Ky. Rev. Stat. §342.700(1) (1993) to recover against Caterpillar and Whayne Supply past and future worker's compensation payments paid to Lewis. After discovering that Lewis subsequently settled his claims against Whayne Supply, the sole party which had previously precluded a removal based on diversity of citizenship, Caterpillar on June 21, 1990 pursuant to 28 U.S.C. §1446(b) (1995) removed the action to the United States District Court for the Eastern District of Kentucky, Ashland Division ("District Court") with jurisdiction being premised on 28 U.S.C. §1332(a)(1) (1993).

Lewis sought a remand arguing that the parties still lacked complete diversity. Notwithstanding the fact that Lewis settled his claims against Whayne Supply, the nondiverse party, Lewis maintained that Whayne Supply remained a party to the action because the scope of his settlement with Whayne Supply did not include Liberty Mutual's subrogation claim against Whayne Supply. Caterpillar took the position that the settlement automatically invoked Liberty Mutual's right of

subrogation against Whayne Supply and thereby by law the settlement included the claim of the worker's compensation carrier against Whayne Supply.

On September 24, 1990, the District Court entered an Order denying a remand to state court. Subsequently, Liberty Mutual settled its dispute with Whayne Supply over the attempt to exclude Liberty Mutual from Lewis' settlement, and on June 8, 1993, the District Court entered an Agreed Order formally dismissing Whayne Supply from the action.

The matter was tried before a jury beginning on November 15, 1993 and ending on November 22, 1993, when a unanimous jury entered a verdict for Caterpillar. The District Court on November 23, 1993 entered a Judgment for Caterpillar.

Lewis appealed to the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit"), which by Opinion dated October 11, 1995 vacated the Judgment of the District Court, finding a lack of subject matter jurisdiction and noting that the District Court should have remanded the action to the state court in 1990 because complete diversity of citizenship did not exist at the time:

> When an action is removed based on diversity, we must determine whether complete diversity exists at the time of removal. *Higgins v. E.I. DuPont De Nemours & Co.*, 863 F.2d 1164, 1166 (4th Cir. 1988).

(Appendix A, p. 6a).

> [A]t the time Caterpillar removed the case to federal court, plaintiff, a resident of Kentucky, remained a party to the case by virtue of his claim against defendant, Caterpillar. Defendant Whayne Supply Co., a Kentucky corporation, was also a party to the case in light of intervening plaintiff Liberty Mutual's subrogation claim against it. Thus, complete diversity did not exist at the time the case was removed to federal court. Unfortunately, we must remand a case that has proceeded through judgment in the district court.

(Appendix A, p. 8a).

The Sixth Circuit failed to consider (1) the subsequent curing of the alleged jurisdictional defect prior to trial, (2) the failure of Lewis to seek review of the denial of his motion for a remand prior to the curing of the alleged jurisdictional defect, and (3) the derivative nature of the subrogation claim asserted by Liberty Mutual against Whayne Supply, *i.e.*, Liberty Mutual was entitled to its statutory share upon Whayne Supply's settlement with Lewis and thereupon ceased to have a viable claim against Whayne Supply. Caterpillar Inc. filed a Petition for Rehearing raising these omissions. The Petition for Rehearing was denied by the Sixth Circuit on November 21, 1995.

ARGUMENT

Underlying the questions presented for review on page i and the argument set forth below is the fact that the Sixth Circuit vacated a judgment entered on a unanimous jury verdict rendered after a six-day trial, in a case that had been practiced in the District Court for five years, on the ground that complete diversity did not exist when the case was removed from the state court – when in fact such diversity did exist at the time of removal and such diversity did exist at the time of trial. Five years of judicial time and resources will have been wasted if this finding is allowed to stand.

I. THERE IS AN INCONSISTENCY AMONGST THE CIRCUITS AS TO WHETHER THE PRINCIPLES OF JUDICIAL ECONOMY ARE VIOLATED BY VACATING A JUDGMENT BASED UPON A FINDING OF LACK OF DIVERSITY WHEN AT THE TIME OF THE TRIAL THE NONDIVERSE PARTY HAD BEEN DISMISSED.

This Petition raises the crucial issue of whether the principles of judicial economy must be sacrificed for the sake of a strict adherence to the general rule that 28 U.S.C. §1332(a) (1) (1993) and 28 U.S.C. §1446(b) (1995) require that in a removed action the jurisdiction of the federal court is determined at the time of removal. *E.g., Jackson v. Allen*, 132 U.S. 27, 33 L.Ed. 249, 10 S.Ct. 9 (1889); *Roecker v. United States*, 379 F.2d 400, 407 (5th Cir. 1967), *cert. denied*, 389 U.S. 1005 (1967). Although this Court and other federal courts have recognized a judicial economy exception to this rule, the boundaries of that exception are unclear. This uncertainty permitted the

Sixth Circuit, relying on an alleged jurisdictional defect at the time of removal, to toss aside as superfluous a unanimous jury verdict entered after a six day trial, despite the fact that all agree that the alleged jurisdictional defect had been cured prior to trial. Such a grave waste of judicial resources, combined with the inconsistent treatment of cured jurisdictional defects amongst the Circuits supports the granting of this Petition.

The circumstances surrounding the alleged jurisdictional defect which prompted the Sixth Circuit to vacate the Judgment and thereby render five years of federal litigation void are simple. When the action was originally brought by Lewis in the Lawrence Circuit Court, the parties were lacking in complete diversity. Plaintiff Lewis was a citizen of Kentucky. Defendant Caterpillar was a citizen of Delaware and Illinois and Defendant Whayne Supply was a citizen of Kentucky. Lewis thereafter entered into a settlement with Whayne Supply, thus eliminating the only nondiverse defendant and allowing Caterpillar on June 21, 1990 to remove the action to the District Court pursuant to 28 U.S.C. §1446(b) (1995).

The removal, however, was objected to by Lewis on the grounds that the scope of his settlement with Whayne Supply was insufficient to include the claims of Liberty Mutual asserted in an intervening complaint against Whayne Supply and Caterpillar. As will be more fully set forth herein (see Argument III *infra*), it was inappropriate for the Sixth Circuit to consider the claims asserted in the intervening complaint for the purposes of determining whether diversity jurisdiction existed. Nonetheless, assuming *arguendo* that Liberty Mutual's intervening complaint against Whayne Supply precluded

the removal, the subsequent dismissal of the claims asserted against Whayne Supply therein cured this alleged jurisdictional defect.

Quite simply, the nondiverse party (whose interests were derivative of the plaintiff's claim) was dismissed from the action prior to trial. The District Court entered an Agreed Order on June 8, 1993 formally dismissing the intervening complaint against Whayne Supply. The matter was subsequently tried beginning on November 15, 1993 and extending to November 22, 1993 without the presence of Whayne Supply, the nondiverse party upon whom the Sixth Circuit relied to vacate the unanimous Jury Verdict and Judgment entered by the District Court on November 23, 1993.

The most basic principles of judicial economy will not permit such a waste of judicial resources. This Court initially defined the requirements of judicial economy in the context of a case where the party opposing removal failed to raise the jurisdictional challenge prior to trial. In *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 31 L.Ed.2d 612, 92 S.Ct. 1344, 1347 (1972), this Court indicated that under such circumstances the subsequent curing of the jurisdictional defect was sufficient to avoid a post-trial remand to the state court:

> Longstanding decisions of this Court make clear, however, that where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had

> original jurisdiction of the case had it been filed in that court.

Grubbs v. General Electric Credit Corp., 92 S.Ct. at 1347. *Grubbs* reaffirmed a prior acknowledgement by this Court that jurisdictional defects could be cured prior to trial:

> There are cases which uphold judgments in the district courts even though there was no right to removal. In those cases, the federal trial court would have had original jurisdiction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of the cause or of the entry of the judgment. That is, if the litigation had been initiated in the federal court on the issues and between the parties that comprised the case at the time of trial or judgment, the federal court would have had cognizance of the case.

American Fire & Casualty Co. v. Finn, 341 U.S. 6, 95 L.Ed. 782, 71 S.Ct. 534, 541, (1951) (footnote omitted).

Grubbs, *Finn*, and their progeny reveal a policy, grounded in the principles of judicial economy, that a post-trial remand to the state court is not required if the federal court has subject matter jurisdiction at the time of the trial and judgment, notwithstanding deficiencies alleged to have existed at the time of removal. *E.g.*, *Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1166 (4th Cir. 1988).

> To permit a case in which there is complete diversity throughout trial to proceed to

> judgment and then cancel the effect of that judgment and relegate the parties to a new trial in a state court because of a brief lack of complete diversity at the beginning of the case would be a waste of judicial resources.

Knop v. McMahan, 872 F.2d 1132, 1139 n.15 (3rd Cir. 1989).

> An impartial reading of precedent indicates . . . that although equity is not a substitute for subject matter jurisdiction, where complete diversity exists at the time of judgment or trial, it would be a waste of judicial resources to dismiss a case in its entirety because it lacked diversity from the moment of its inception.

Iscar Ltd. v. Katz, 743 F. Supp. 339, 344 (D. N.J. 1990). *See also, Davis v. Customized Transp., Inc.*, 854 F. Supp. 513, 517 (N.D. Ohio, 1994) ("Because there is complete diversity and the proper amount in controversy, this court has subject matter jurisdiction and can enter judgment regardless of the fact that the case was improperly removed.").

The Sixth Circuit has in the past recognized the wisdom of this policy noting: "The *Grubbs* rule is eminently sensible and conservative of judicial economy. It was the approach adopted long ago in this Circuit, . . ." *Chivas Products Ltd. v. Owen*, 864 F.2d 1280, 1286 (6th Cir. 1988). Thus, in *Riggs v. Island Creek Coal Co.*, 542 F.2d 339, 343 (6th Cir. 1976), the Sixth Circuit upheld the jurisdiction of the District Court, following an improper removal, based on a finding that it would be "absurd" to

rely on a prior jurisdictional defect to vacate a judgment rendered under complete diversity.

Notwithstanding these authorities, the Sixth Circuit vacated the Judgment granted by the District Court to this Petitioner due to an alleged jurisdictional defect cured prior to the trial and entry of Judgment. The Sixth Circuit did not indicate why it refused to follow *Grubbs, Finn* and their progeny. It may be speculated that since Lewis argued before the Sixth Circuit that the principles of judicial economy were limited to circumstances in which the party opposing the removal failed to seek a remand, the Sixth Circuit thought the precedent to be distinguished on this ground. The Sixth Circuit may have thought that the fact that Lewis filed a motion to remand, which was denied by the District Court, precluded the application of the principles of judicial economy. Yet, such a strict reading of *Grubbs* and *Finn* is inappropriate. *See, Able v. Upjohn Co.*, 829 F.2d 1330 (4th Cir. 1987), *cert. denied*, 485 U.S. 963 (1988) and *Gould v. Mut. Life Ins. Co. of New York*, 790 F.2d 769 (9th Cir. 1986), *cert. denied*, 479 U.S. 987 (1986).

In both *Able* and *Gould* the district court denied a motion to remand; notwithstanding the fact that the jurisdictional defect was timely raised, the appellate court refused to vacate the subsequent judgment which was entered under complete diversity. The reasoning of the appellate courts in both cases was identical to the reasoning applied in *Grubbs* where the jurisdictional defect went unchallenged. In *Able v. Upjohn Co.*, 829 F.2d at 1334 the Fourth Circuit held:

> Here, judicial economy and finality require that the district court's judgment be allowed to stand. Where a matter has

> proceeded to judgment on the merits and principles of federal jurisdiction and fairness to parties remain uncompromised, to disturb the judgment on the basis of a defect in the initial removal would be a waste of judicial resources. *See Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 702, 92 S.Ct. 1344, 1347, 31 L.Ed.2d 612, (1972).

The same result was reached by the Ninth Circuit in *Gould v. Mut. Life Ins. Co. of New York*, 790 F.2d at 774: "[u]nder the Grubbs/American Fire rule, the court below had subject matter jurisdiction." Thus the Fourth and Ninth Circuits have recognized that *Grubbs*, *Finn*, and their progeny are not limited in application to cases in which the party opposing removal failed to timely raise the jurisdictional challenge.

The Sixth Circuit erred in failing to recognize as well the extended application of the principles of judicial economy outside the context of a waiver. That error will no doubt be repeated if the controversy is not resolved by this Court. Caterpillar requests that its Petition be granted to enable this Court to insure a uniform application of the principles of judicial economy to removed actions.

II. THE CIRCUITS ARE ADDITIONALLY INCONSISTENT AS TO WHETHER A JURISDICTIONAL CHALLENGE TO A REMOVED ACTION MUST BE RAISED IN AN INTERLOCUTORY APPEAL OR THEREAFTER BE WAIVED IF THE JURISDICTIONAL DEFECT IS CURED.

This Petition raises a related inconsistency amongst the Circuit Courts of Appeals. The Fourth and Ninth Circuits have recognized that the drastic consequences of a post-trial review of a jurisdictional defect can be avoided by requiring the party seeking a remand to file an interlocutory appeal from the denial of the motion to remand. In contrast, the First, Fifth, and D.C. Circuits have rejected such a requirement. The granting of this Petition will enable this Court to resolve this significant controversy.

The facts set forth in this Petition illustrate the severity of the resolution adopted by the Sixth Circuit. The alleged jurisdictional defect relied upon by the Sixth Circuit to vacate the Judgment in 1995 was readily identified by Lewis in 1990 when the action was first removed. The District Court on September 24, 1990 entered an Order denying the remand sought by Lewis. Rather than file an interlocutory appeal as authorized by 28 U.S.C. §1292(b) (1995) and raising the alleged jurisdictional defect at the outset, Lewis permitted the action to continue in the federal system for five years, culminating in an appellate decision which vacated the Judgment entered by the District Court and thereby rendered the efforts of the parties, the court, and jury a complete nullity. Such a strategy should not have been condoned by the Sixth Circuit. The interests of finality and judicial economy "strongly suggest that the district

court's judgment should not be disturbed where a party fails to avail himself of a remedy that might earlier have resolved the removal question." *Able v. Upjohn Co.*, 829 F.2d at 1333.

The teaching of this Court as reflected in *Grubbs* and *Finn* have been relied upon by several Circuits to hold that a party who fails to pursue an interlocutory appeal pursuant to 28 U.S.C. §1292(b) (1995) is precluded at a later date from relying on a jurisdictional defect to avoid jurisdiction where such defect has been cured prior to judgment. *E.g., Sheeran v. General Elect. Co.*, 593 F.2d 93, 97 (9th Cir. 1979), *cert. denied*, 444 U.S. 868 (1979).

> When a party elects to forego an interlocutory appeal, he runs the risk that the federal court will enter judgment on the basis of complete diversity. (citation omitted). This rule forces parties to give careful consideration to the importance of their objection to removal, but brings the benefit of early determination of the proper forum.

Able v. Upjohn Co., 829 F.2d at 1334.

> If the district court "would have had original jurisdiction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of the cause or of the entry of judgment," then the estoppel that applies to prevent a party from raising the removal errors does not "endow [the court] with a jurisdiction it could not possess." (citation omitted).

Gould v. Mut. Life Ins. Co. of New York, 790 F.2d at 773 (quoting *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 95 L.Ed. 782, 71 S.Ct. 534, 541 (1951)).

There is, however, an acknowledged conflict amongst the Circuits as to whether the jurisdictional defect must be raised before the appellate court at the first available opportunity. *See Sheeran v. General Elect. Co.*, 593 F.2d at 97 describing the conflict. The First Circuit for example has held:

> Denial of remand is a non-appealable interlocutory order, and a plaintiff whose request has been rejected does not waive his objection by then proceeding with his case in the ordinary course.

Brough v. United Steelworkers of America, 437 F.2d 748, 749 (1st Cir. 1971). The Fifth and D.C. Circuits follow this reasoning as well. *See Neal v. Brown*, 980 F.2d 747 (D.C. Cir. 1992), *cert. denied*, 113 S.Ct. 1945 (1993); *Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 105 (5th Cir. 1990), *cert. denied*, 498 U.S. 817 (1990).

The facts set forth in this Petition exemplify the harsh consequences of the reasoning adopted by the First, Fifth and D.C. Circuits. The difficult deliberations of a unanimous jury which labored through a six day trial and the five years to which the federal judiciary devoted its resources to this litigation have been discarded as if of no consequence. This wasted effort could have been avoided if Lewis had filed an interlocutory appeal in 1990 when the District Court denied his motion to remand.

This Court may prevent further needless drain on the federal judicial resources by granting this Petition and

by resolving the controversy amongst the Circuits as to whether an interlocutory appeal is required in order to preserve a challenge to the jurisdiction of the federal court where the jurisdictional defect is cured prior to trial.

III. THERE IS AN UNCERTAINTY IN THE FEDERAL COURTS AS TO HOW DERIVATIVE CLAIMS SHOULD BE CONSIDERED FOR THE PURPOSES OF DETERMINING DIVERSITY OF CITIZENSHIP.

"The law of removal jurisdiction currently stands in an indefinite condition marked by uncertainty and inconsistency." *Hopkins Erecting Co. v. Briarwood Apartments of Lexington*, 517 F. Supp. 243, 247 (E.D. Ky. 1981). This absence of precedent led the Sixth Circuit to vacate the Judgment by erroneously relying upon a derivative claim against a nondiverse defendant with whom the plaintiff had settled. The granting of the Petition will permit this Court to fill this significant gap and to explain the role that derivative claims should play in the diversity analysis in removal actions.

Although there are a variety of circumstances under which derivative claims can be asserted, the claims herein arose in the context of a subrogation claim asserted by Liberty Mutual. The Sixth Circuit evidently did not recognize the true nature of this claim. Such subrogation claims are frequently asserted in personal injury actions by worker's compensation carriers who have paid benefits to the injured employee who is bringing suit against the tortfeasors alleged to have caused the injuries. It is common in the trial of such cases for the intervening carrier not to be mentioned and

not to participate. If a plaintiff employee receives a verdict, the trial judge then determines the amount of the judgment the carrier is entitled to recover. After Lewis brought suit against Whayne Supply and Caterpillar, Liberty Mutual filed an intervening complaint against both Whayne Supply and Caterpillar seeking reimbursement for worker's compensation benefits paid and to be paid to Lewis as a result of the injuries alleged in the complaint.

Lewis then settled his claims against Whayne Supply, the only nondiverse defendant. A voluntary dismissal or discontinuation of an action against the defendant whose presence in the case prevents remand makes the case removable. *Bumgardner v. Combination Engineering, Inc.*, 432 F. Supp. 1289, 1291 (D. S.C. 1977).

> A settlement between a plaintiff and the non-diverse defendant is final enough to support removal, even if the non-diverse defendant has not been severed from the case. (citation omitted).

Ratcliff v. Fibreboard Corp., 819 F. Supp. 584, 587 (W.D. Tex. 1992). Thus, the settlement between Lewis and Whayne Supply enabled Caterpillar to remove the action to federal court under 28 U.S.C. §1446 (1995).

This result is not altered by the fact that the Liberty Mutual claim against Whayne Supply remained of record. The court is not so bound by the technical form of the pleadings. *See Florida First Nat'l Bank of Jacksonville v. Bagley*, 508 F. Supp. 8, 9 (M.D. Fla. 1980). The Sixth Circuit should have gone beyond the pleadings to determine the viability of Liberty Mutual's claim against Whayne Supply.

Liberty Mutual's statutory subrogation claim was inextricably tied to Lewis' claim against Whayne Supply. It was premised on Ky. Rev. Stat. §342.700(1) (1993) which provides that the insurer "may recover in his or its own name or that of the injured employee from the other person in whom legal liability for damages exists." "[I]t is settled that an insurer's statutory subrogation right under KRS 342.700(1) is a derivative rather than an independent right." *United States Fidelity & Guar. Co. v. Fox*, 872 S.W.2d 91, 94 (Ky. Ct. App. 1993), citing *National Biscuit Co. v. Employers Mut. Liability Ins. Co.*, 313 Ky. 305, 231 S.W.2d 52, 54 (1950).

> [The Worker's Compensation Act] does not create a new cause of action in favor of the employer or his insurance carrier, but merely authorizes the employer or his insurance carrier in his or its own name or in the name of the injured employee to institute and prosecute the injured employee's cause of action. (citation omitted).

National Biscuit Co. v. Employers Mut. Liability Ins. Co., 231 S.W.2d at 53.

> [T]he rights to reimbursement and subrogation provided by statute are tied directly to the employee's recovery of damages from a third party. It is not in addition to the jury's award.

Ingersoll-Rand Co. v. Rice, 775 S.W.2d 924, 931 (Ky. Ct. App. 1989).

> The compensation insurance carrier should intervene to notify the court of its claim for reimbursement from the plaintiff's recovery. Having notified the court by intervening complaint of such right to reimbursement [the insurance carrier] should have been entitled to reimbursement . . . .

Zurich American Ins. Co. v. Haile, 882 S.W.2d 681, 686 (Ky. 1994).

To the extent that the employee recovers against a tortfeasor damages for loss of earnings "the compensation carrier is subrogated and, . . . is entitled to be reimbursed before the claimant collects." *Hillman v. American Mut. Liability Ins. Co.*, 631 S.W.2d 848, 850 (Ky. 1982). Where the plaintiff employee has filed an action against a third party, it is the purpose of the statute "to reimburse the employer or his insurance carrier out of any recovery against the third party tort feasor". *National Biscuit Co. v. Employers Mut. Liability Ins. Co.*, 231 S.W.2d at 54. Liberty Mutual's "rights derive from the employee's right to payment and are a corollary to the employee's right to payment." *Mastin v. Liberal Markets*, 674 S.W.2d 7, 11 (Ky. 1984). Accordingly, once Lewis settled with Whayne Supply, Liberty Mutual was "entitled to immediate statutory subrogation as to such amount of [the] settlement as duplicate worker's compensation benefits." *Mastin v. Liberal Markets*, 674 S.W.2d at 14. *See also Roberts v. United States Fidelity & Guaranty Co.*, 273 S.W.2d 39, 41 (Ky. 1954) ("Any recovery of [plaintiff against defendant], to the extent he has received compensation payments from the insurance carrier, is automatically assigned to the latter by operation of law.").

The settlement triggered Liberty Mutual's subrogation rights.

Under Kentucky law, Liberty Mutual's derivative claims against Whayne Supply therefore did not survive the settlement between Lewis and Whayne Supply. Thus, at the time of removal, the only true parties to this action were Lewis, Caterpillar, and Liberty Mutual asserting a derivative claim against Caterpillar. Since Lewis, Caterpillar and Liberty Mutual were all diverse parties, there was no jurisdictional defect to preclude the District Court from exercising diversity jurisdiction over the action at the time of removal. The Sixth Circuit thereby erred in vacating the Judgment entered by the District Court based on the continued presence of Whayne Supply in the action.

Unfortunately, there was little precedent to guide the Sixth Circuit in its review of this removal issue. This Court has recognized in a different context that it is the duty of the lower federal courts to "'look beyond the pleadings and arrange the parties according to their sides in the dispute.'" (citations omitted). *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 86 L.Ed. 47, 62 S.Ct. 15, 17 (1941). This Court has further recognized that an unnecessary and dispensable party should not be considered in ascertaining whether diversity jurisdiction exists. *See Salem Trust Co. v. Manufacturers' Finance Co.*, 264 U.S. 182, 68 L.Ed. 628, 44 S.Ct. 266, 267 (1924).

Various lower courts have likewise found that substance should not be permitted to rule over form. *E.g., Lesher by Lesher v. Andreozzi*, 647 F. Supp. 920 (M.D. Pa. 1986) (fact that nondiverse party had not been formally dismissed from action did not preclude removal when plaintiff settled with such defendant). *See also Reed*

v. Safeway Store, Inc., 400 F. Supp. 702 (N.D. Okla. 1925) (court refused to consider claim against nondiverse defendant where there was no legal theory by which such defendant could be held liable for the plaintiff's injuries). In a variety of contexts the lower courts have indicated that the presence of a nominal party would not destroy diversity jurisdiction. *E.g., Saxe, Bacon & Bolan, P.C. v. Martindale-Hubbell, Inc.*, 521 F. Supp. 1046, 1047 (S.D. N.Y. 1981); *Iowa Pub. Serv. Co. v. Medicine Bow Coal Co.*, 556 F.2d 400, 404 (8th Cir. 1977). There is, however, a void with regard to how claims purely derivative of the plaintiff's claims should be treated after the plaintiff's claim is settled.

Given the frequency in which subrogation claims are asserted in personal injury actions, this controversy is likely to arise again, not only in the Sixth Circuit but other Circuits as well. Caterpillar accordingly requests the Court to grant its Petition and thereby clarify how such claims should be treated by all the Circuits when determining whether or not the parties are in complete diversity.

CONCLUSION

For these compelling reasons which indicate that there is much uncertainty in the federal courts concerning the removal issues raised herein, Caterpillar Inc. requests that this Petition for a Writ of Certiorari be granted.

Respectfully submitted on this 7th day of February, 1996.

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APPENDIX

APPENDIX A

FILED
Oct. 11, 1995
Leonard Green, Clerk

Not For Publication

No. 94-5253

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES DAVID LEWIS, Plaintiff-Appellant,	)	
LIBERTY MUTUAL INSURANCE GROUP, Intervening Plaintiff,	)	
v.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY
CATERPILLAR, INC. Defendant and Third-Party Plaintiff-Appellee,	)	
GENE A. WILSON ENTERPRISES, INC., Third-Party Defendant,	)	
WHAYNE SUPPLY COMPANY, Defendant.	)	

BEFORE: WELLFORD, MILBURN, and SUHRHEINRICH, Circuit Judges.

PER CURIAM. Plaintiff James David Lewis appeals the jury verdict for defendant Caterpillar, Inc. in this diversity action for personal injury. On appeal, the issues are (1) whether the district court erred in denying plaintiff's motion to remand the case to state court, (2) whether the district court erred in limiting the scope of discovery of prior similar accidents, (3) whether this court should enter sanctions against defendant for defendant's alleged improper response to discovery requests, (4) whether the district court erred in excluding certain exhibits, (5) whether the district court erred in excluding certain witnesses from testifying at trial, and (6) whether the district court erred by failing to instruct the jury on defendant's alleged failure to warn. For the reasons that follow, we vacate and remand.

I.

A.

On July 9, 1988, plaintiff James David Lewis, a resident of Louisa, Kentucky, was injured while he was

operating a Caterpillar D8K bulldozer, which was manufactured by defendant Caterpillar, Inc., a Delaware corporation with its principal place of business in Illinois. While plaintiff was operating the bulldozer near Louisa, Kentucky, a hydraulic hose connected to the cylinder that raises and lowers the bulldozer blade ruptured causing hydraulic fluid to spray over the engine of the bulldozer and also on plaintiff. The fluid ignited, and plaintiff received burns over approximately 48% of his body.

The evidence at trial showed that the steel hydraulic hose ruptured because it was positioned against the hood of the bulldozer causing the two steel surfaces to grind against each other. Caterpillar presented evidence that its XT3 hydraulic hoses are made with four layers of steel wrappings that give them a hardness greater than that of ball-bearing steel. Caterpillar argued at trial that several conditions existing in the D8K at the time of the accident, but not existing at the time of the D8K's manufacture, caused the hydraulic hose to fail. Caterpillar presented evidence that at some point prior to the accident, the D8K had been hit with a force of 15,000 to 30,000 pounds. This force sheared off a bolt that stabilized the tube assembly to which the hydraulic hoses were connected and bent the tube assembly about 20 degrees.

In addition, Caterpillar presented evidence that the hoses in the D8K at the time of the accident were manufactured by someone other than Caterpillar and were an inch to an inch and a half too long. Because the

hoses were too long, they made a larger loop thereby coming closer to the hood of the D8K. Further, evidence showed that the hoses, which had different types of connections on each end, had been installed backwards also causing the hoses to be positioned closer to the hood. Although Caterpillar's maintenance manual includes a visual depiction of how the hose is to be installed, the parties disputed whether this adequately explained the proper installation of the hoses.

On the other hand, plaintiff argued at trial that, notwithstanding these conditions, the D8K had a design defect that caused the accident in this case. Plaintiff's expert, Wayne Coloney, testified that the accident could have been avoided if Caterpillar had used a deflecting shield that would have prevented hydraulic fluid from spraying on the operator of a D8K should a hydraulic hose rupture. Plaintiff also argued that Caterpillar was aware of the propensity for and the danger of hydraulic hoses rupturing and causing fires on the D8K.

B.

Plaintiff initiated this action on June 22, 1989 in the Lawrence [Kentucky] Circuit Court. In his complaint, plaintiff alleged strict liability in tort, negligence, and breach of warranty and named as defendants Caterpillar, Inc., the manufacturer of the bulldozer, and Whayne Supply Co., a Kentucky corporation with its principal place of business in Kentucky, which serviced the bulldozer prior to the incident at issue in this case. After plaintiff filed his complaint, Liberty Mutual Insurance

Company ("Liberty Mutual"), a Massachusetts corporation with its principal place of business in Massachusetts, intervened as a plaintiff in the case. Liberty Mutual brought claims against both Caterpillar and Whayne Supply Co. for subrogation of worker's compensation benefits paid to Lewis on behalf of his employer and third-party defendant, Gene A. Wilson. While the case was pending in the state court, plaintiff entered into a settlement agreement with Whayne Supply Co. However, because Liberty Mutual was not included in the settlement agreement, it continued to assert its claims against Whayne Supply Co. Liberty Mutual also filed a cross-claim against Lewis for reimbursement for any worker's compensation paid him by Whayne Supply Co. with regard to Liberty Mutual's subrogation interest.

After learning of the settlement between plaintiff and Whayne Supply Co., Caterpillar removed the case to federal court, over Lewis' objection, on June 21, 1990. Plaintiff and Whayne Supply Co., however, did not file anything notifying the Lawrence Circuit Court of the settlement until August 2, 1990. Lewis subsequently filed a motion to remand the case to state court on the ground that because defendant Whayne Supply Co., a Kentucky corporation, remained a defendant in the case by virtue of Liberty Mutual's subrogation claim, there was not complete diversity at the time of the removal from the state court. The district court denied this motion on September 24, 1990.

Whayne Supply Co. and Liberty Mutual

subsequently settled their claims on June 8, 1993. A jury trial commenced on November 15, 1993. The jury returned a verdict in favor of defendant Caterpillar, Inc. on November 22, 1993. Plaintiff then filed a motion for a new trial, but the district court denied this motion on February 1, 1994. This timely appeal followed.

II.
A.

Plaintiff argues that the district court erred in denying his motion to remand the case to state court. Specifically, plaintiff asserts that the district court lacked subject matter jurisdiction because complete diversity between the parties did not exist at the time of removal. Plaintiff bases this assertion on the fact that, at the time of removal, plaintiff, a Kentucky resident, continued to be a party to the case, and defendant Whayne Supply Co., a Kentucky corporation, remained a defendant in the case by virtue of intervening plaintiff Liberty Mutual's subrogation claim against it. Removal is a question of federal subject matter jurisdiction that we review de novo. *Certain Interested Underwriters at Lloyd's London, England v. Layne*, 26 F.3d 39, 41 (6th Cir. 1994); *Van Camp v. AT&T Information Sys.*, 963 F.2d 119, 121 (6th Cir.), *cert. denied*, 113 S. Ct. 365 (1992). When reviewing the denial of a motion to remand a case to state court, "we look to determine '"whether the case was properly removed to federal court in the first place."'" *Van Camp*, 963 F.2d at 121 (quoting *Fakouri v. Pizza Hut of America, Inc.*, 824 F.2d

470, 472 (6th Cir. 1987) (quoting *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 818 (9th Cir. 1985)). *When an action is removed based on diversity, we must determine whether complete diversity exists at the time of removal. Higgins v. E.I. DuPont De Nemours & Co.*, 863 F.2d 1162, 1166 (4th Cir. 1988). Under 28 U.S.C. § 1332(a)(2), subject matter jurisdiction based on diversity of citizenship vests federal district courts with jurisdiction in cases of sufficient value between "citizens of a State and citizens or subjects of a foreign state." *Id.* A natural person's citizenship is determined by his domicile, while a corporation has the citizenship of the state of its incorporation and its principal place of business. *Safeco Ins. Co. v. City of White House*, 36 F.3d 540, 544 (6th Cir. 1994). "Diversity jurisdiction attaches only when all parties on one side of the litigation are of a different citizenship from all parties on the other side of the litigation." *SHR Limited Partnership v. Braun*, 888 F.2d 455, 456 (6th Cir. 1989). Accord *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, (1806); *Safeco Ins. Co.*, 36 F.3d at 545; and *Certain Interested Underwriters*, 26 F.3d at 42. In this regard, "[a] plaintiff seeking to bring a case into federal court carries the burden of establishing diversity jurisdiction." *Certain Interested Underwriters*, 26 F.3d at 41.

Caterpillar asserts that diversity jurisdiction was created when plaintiff settled with Whayne Supply Co. Thus, "[t]he question is simply whether, at the time of removal, the plaintiffs effectively 'ha[d] taken the resident defendant out of the case, so as to leave a controversy wholly between the plaintiff[s] and the nonresident

defendant.'" *Vasquez v. Alto Bonito Gravel Plant Corp.*, 56 F.3d 689, 692 (5th Cir. 1995) (quoting *American Car & Foundry Co. v. Kettelhake*, 236 U.S. 311, 316 (1915)). See *Mancari v. AC & S Co.*, 683 F. Supp. 91, 93 (D. Del. 1988) (applying the voluntary act of the plaintiff doctrine and holding that a case may become removable after being initiated in state court where non-diverse defendant was dismissed from case leaving a new state of complete diversity between the parties). In this case, as plaintiff notes, Liberty Mutual continued to assert its claim against defendant Whayne Supply Co. after plaintiff settled with Whayne Supply Co.[1] Thus, at the time Caterpillar removed the case to federal court, plaintiff, a resident of Kentucky, remained a party to the case by virtue of his claim against defendant Caterpillar. Defendant Whayne Supply Co., a Kentucky corporation, was also a party to the case in light of intervening plaintiff Liberty Mutual's subrogation claim against it.[2] Thus, complete diversity

---

[1] Plaintiff claims that his settlement with Whayne Supply Co. was only partial and that he reserved a claim against Whayne Supply Co. for reimbursement for worker's compensation paid to him by Liberty Mutual. Lewis asserts that Liberty Mutual's subrogation claim against defendant Whayne Supply Co. was filed on behalf of Liberty Mutual and himself. We need not resolve this issue in light of our conclusion that because plaintiff and defendant Whayne Supply Co. remained parties to the case at the time of removal, diversity was not complete.

[2] Although Caterpillar argues on appeal that parties named in an intervening complaint are not included in diversity

(continued...)

did not exist at the time that the case was removed to federal court. Unfortunately, we must remand a case that has proceeded through judgment in the district court. We hold that the district court erred in denying plaintiff's motion to remand this case to the state court for lack of subject matter jurisdiction because complete diversity did not exist at the time this case was removed from the state court.[3]

III.

For the reasons stated, the judgment of the district court is VACATED and this case is REMANDED to the district court.

---

[2](...continued)
determinations, Caterpillar cites no authority for this proposition. This argument is not persuasive. This court has held under other circumstances that an intervening party may destroy diversity jurisdiction. Cf. *Jenkins v. Reneau*, 697 F.2d 160, 162 (6th Cir. 1983) (holding that an intervening petition by a non-diverse indispensable party destroys diversity jurisdiction).

[3] Because we hold that the district court lacked jurisdiction over this case, we do not reach plaintiff's other arguments on appeal.

APPENDIX B

Eastern District of Kentucky
FILED
Nov. 22, 1993
At Ashland
Leslie G. Whitmer
Clerk, U.S. District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

CIVIL MINUTES – TRIAL

ASHLAND
Case No. 90-84 At Ashland, Kentucky

Date: November 22, 1993

Style: JAMES DAVID LEWIS, ET AL. vs.
CATERPILLAR, INC., ET AL.

DOCKET ENTRY The motion of the parties to withdraw all chart exhibits is GRANTED and all chart exhibits shall be returned to the submitting party.

PRESENT:
HON. HENRY R. WILHOIT, JR.,
JUDGE.

Christina M. Venoy, Deputy Clerk — Peggy W. Weber, Court Reporter.

ATTORNEYS PRESENT FOR PLAINTIFFS:
Leonard Stayton
Phillip Moloney for Int. Pltf.

ATTORNEYS PRESENT FOR DEFENDANTS:
William Maready
Leslie Morris
Phillip Moloney for 3rd Party Deft.

____ Case called and continued to _____ for trial.
___ COURT TRIAL ___x___ JURY TRIAL

The Jury impaneled and sworn is as follows:

(1) 376 Vanessa L. Lowe (3) 429 Joseph Southers
(2) 437 Beverly J. Litteral (4) 324 Larry E. Wright

(5) 361 Mary A. Springer (7) 357 David J. Gollihue
(6) 306 Pamela J. Reynolds

(2nd Alternate) _____

____ Introduction of evidence for __ plaintiff
___ defendant __ begun, ___ resumed, not/and concluded;
____ Rebuttal evidence; __Surrebuttal evidence
___ Continued to _____ further trial.
___x___ Jury retires to deliberate at ___11:35 a.m.___;
Jury returns at ___3:55 p.m.___.
_____ JUDGMENT BY COURT ___x___ JURY VERDICT.

SEE VERDICT OR ANSWERS TO INTERROGATORIES

___x___ Jury polled.
_____ Proposed Findings of Fact, Conclusions of Law & Judgment to be prepared by ___ plaintiffs; ____ defendant.
____ Submitted. ____ BRIEFS to be filed _____ Plaintiff
_____ Defendant _____ Reply
within _____ days following the filing of transcript by Official Court Reporter.

Copies:

Initials of Deputy Clerk ____

APPENDIX C

Eastern District of Kentucky
FILED
Nov. 23, 1993
At Ashland
LESLIE G. WHITMER
Clerk, U.S. District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

JAMES DAVID LEWIS,
Plaintiff,
and

LIBERTY MUTUAL INSURANCE GROUP,
Intervening Plaintiff,

v. JUDGMENT IN A CIVIL CASE

CATERPILLAR, INC.,
Defendant and Third Party Plaintiff,

vs. CASE NUMBER: ASHLAND 90-84

GENE WILSON ENTERPRISES,
Third Party Defendant.

x **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict by answers to

Special Interrogatories,

___ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the plaintiff and intervening plaintiff take nothing, that the action be dismissed on the merits, and that the defendant, Caterpillar, Inc., recover of the plaintiffs, its costs of this action.

November 23, 1993
Date

LESLIE G. WHITMER, Clerk
Clerk

Christina M. Venoy
(By) Deputy Clerk

APPENDIX D

FILED
Nov. 21, 1995
Leonard Green, Clerk

No. 94-5253

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES DAVID LEWIS, Plaintiff-Appellant,

LIBERTY MUTUAL INSURANCE GROUP, Intervening Plaintiff,

v.

CATERPILLAR, INC. Defendant and Third Party Plaintiff-Appellee,

GENE A. WILSON ENTERPRISES, INC., Third Party Defendant,

WHAYNE SUPPLY COMPANY, Defendant.

ORDER

BEFORE: WELLFORD, MILBURN, and SUHRHEINRICH, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk *pe*